No. 92-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,
v.
COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether airlines have a private right of action to challenge the reasonableness of airport user fees and rental charges under the Anti-Head Tax Act.

2. Whether airport user fees and rental charges are reviewable under the dormant commerce clause.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. State and local governments operate nearly all of the nation's airports providing commercial passenger services and have made substantial fiscal investments in them. *Amici*'s members will thus be directly affected by the resolution of the issues presented in this case.

The Court is called upon to address the applicability of the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513, and the dormant commerce clause, to the fees and charges collected by the nation's airports for the provision of services such as the use of runways and terminals. Petitioners' asserted rights of action would interject the federal courts into disputes over these matters in derogation of the carefully crafted partnership between the Secretary of Transportation and the States created to develop the nation's airports. Recognition of petitioners' asserted rights of action will threaten the fiscal health of the nation's airports and their ability to make capital improvements to their facilities. Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

1. The AHTA's text, structure and legislative history demonstrate that it does not provide a private right of action to challenge the reasonableness of respondents' rental charges and user fees. In response to this Court's decision in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which upheld an airport charge on each enplaning passenger against a commerce clause challenge, Congress enacted the AHTA for the limited purpose of prohibiting head taxes and their equivalents. Accordingly, section 1513(a) prohibits States and their subdivisions from "levy[ing] or collect[ing] a tax, fee, head charge, or other charge directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." 49 U.S.C. App. § 1513(a). As the Court has recognized, subsection (a) is a limited preemption provision. *Aloha Airlines, Inc. v. Director of Taxation of Haw.*, 464 U.S. 7, 12 n.6 (1983). Petitioners' assertion that

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

the AHTA "prohibits all 'unreasonable' user fees on aircraft operators," Pet. Br. 21, is plainly contradicted by the text of subsection (a), which does not contain "unreasonable user fees" or any similar formulation in its enumeration of prohibited taxes and fees. *See* 49 U.S.C. App. § 1513(a). If, in enacting the AHTA, Congress had intended to provide a private right of action to challenge unreasonable user fees or rental charges, it would have inserted appropriate language into subsection (a).

Nor does subsection (b) authorize judicial challenges to the reasonableness of airport fees and rental charges. As its heading states, § 1513(b) affirmatively sets forth "[p]ermissible [s]tate taxes and fees," 49 U.S.C. App. § 1513(b); it does not, unlike § 1513(a), set forth a "prohibition" of state taxes and fees. Accordingly, if, in enacting the AHTA, Congress had intended to prohibit unreasonable user fees and rental charges, the natural place to have done so would have been in subsection (a) and not subsection (b).

Petitioners' reliance on Congress's insertion of the term "reasonable" into subsection (b)'s enumeration of permissible taxes and fees to authorize a private right of action to challenge airport user fees ignores the comprehensive background of aviation law against which the AHTA was enacted. Congress's purpose in inserting the term "reasonable" into subsection (b) was to reconcile subsection (b) with the project sponsorship assurance requiring an airport which accepts federal funding to "be available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210 (a)(1). Without the insertion of the term "reasonable" into § 1513(b), the AHTA could be read as superseding this project sponsorship assurance. Accordingly, the AHTA's text and structure make clear its limited purpose —to prohibit head taxes and their equivalents while leaving undisturbed the authority of the States and their subdivisions to levy and collect other airport taxes and fees.

The legislative history provides additional evidence of the AHTA's limited purpose. The AHTA was enacted

in response to this Court's decision in *Evansville* which upheld, against a commerce clause challenge, an airport charge on each enplaning passenger. As the Senate Report noted, such "head taxes" were "particularly annoying" as they caused "confusion, delay, anger and resentment" as ticket agents attempted to collect them. S. Rep. No. 12, 93d Cong., 1st Sess. 17, 21 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1434, 1446, 1450. Congress also viewed them as "constitut[ing] an inequitable, double burden of taxation on air passengers." S. Rep. at 21, 1973 U.S.C.C.A.N. at 1450. Congress, however, expressed no reservation about airport rental charges and user fees, *see generally id.* at 17-26, 1973 U.S.C.C.A.N. 1446-55, and Congress's concerns about the imposition of head taxes are inapplicable to airport user fees and rental charges.

Petitioners' contention that the AHTA provides an implied private right of action also reflects a fundamental misunderstanding of the principles of federalism which this Court has articulated to guide the construction of ambiguous statutes affecting the States and their political subdivisions. Interjecting the federal courts as the rent control boards for the nation's airports on the basis of a single word—"reasonable"—in § 1513(b) would " 'alter the 'usual constitutional balance between the States and the Federal Government.' " *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2401 (1991) (citations omitted). Because the express terms of the AHTA neither provide for judicial enforcement of its provisions nor include unreasonable rental charges and user fees in the enumeration of prohibited taxes and fees, *see* 49 U.S.C. App. § 1513(a), Congress has not provided a plain and unambiguous statement of its intent to subject the States and their subdivisions to private suits challenging the reasonableness of airport rental charges and user fees.

2. Petitioners' commerce clause claim is also meritless. As both the AHTA and the Airport and Airway Improvement Act of 1982 (AAIA), Pub. L. No. 97-248, 96 Stat. 671 (1982) (codified at 49 U.S.C. App. § 2201 et seq.),

demonstrate, Congress has "manifest[ed] its unambiguous intent" to foreclose commerce clause review. *Wyoming v. Oklahoma*, 112 S.Ct. 789, 802 (1992). In 1982, Congress amended the AHTA, adding subsection (d) which sets forth those "[a]cts which unreasonably burden and discriminate against interstate commerce." *See* Pub. L. No. 97-248, § 532(b), 96 Stat. at 701-02 (codified at 49 U.S.C. App. § 1513(d)). Significantly, Congress did not include unreasonable user fees and rental charges when it enumerated those acts which unreasonably burden commerce. *See generally id.*

Even more important, Congress specifically addressed the reasonableness of airport rental charges in the AAIA. Congress's enactment of the project sponsorship conditions, including the requirement that "the airport . . . be available for public use on fair and reasonable terms and without unjust discrimination," 49 U.S.C. App. § 2210 (a)(1)—coupled with its enactment of a mechanism for enforcing violations of this provision, *see* 49 U.S.C. App. §§ 2210(b), 2218(a)—unambiguously demonstrate that in the area of airport user fees and rental charges, "Congress has struck the balance it deems appropriate [and] the courts are no longer needed to prevent States from burdening commerce." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

Moreover, judicial intervention under the commerce clause would undermine other aspects of Congress's carefully crafted scheme for the development of the nation's airports. As recently as 1990, Congress authorized the Secretary to grant public airports the authority to impose a charge of up to $3.00 per enplaning passenger to finance airport projects. *See* Aviation Safety and Capacity Expansion Act of 1990, § 9110, Pub. L. No. 101-508, 104 Stat. 1388-353, 1388-357 (1990) (codified at 49 U.S.C. App. § 1513(e)). The Secretary has granted respondents the authority to impose this charge at their airport. *Passenger Facility Charge (PFC) Approvals and Disapprovals*, 57 Fed. Reg. 49108, 49109 (1992). The enactment of § 1513(e), coupled with the Secretary's

grant to respondents of the authority to impose this charge (which will raise twelve million dollars to finance runway improvements, *see id.*) firmly rebut petitioners' claims that the fees assessed here unreasonably burden commerce.

Finally, petitioners' claim would require an unprecedented expansion of dormant commerce clause doctrine to include actions taken by the States in their proprietary, as opposed to sovereign, capacities. The Court has recognized that "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980). Accordingly, the Court has also held that "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 439.

As the district court found, the relationship between the airlines and airport "is one of landlord and tenant" which "manifests itself in leases entered into between the Airport and various users of the Airport." Pet. App. 26. Accordingly, in setting the fees and rents for the use of their facilities, respondents were engaged in the proprietary activity of renting their facility and not a sovereign function of taxing or regulating. *See* 49 U.S.C. App. § 1305(b) (recognizing proprietary powers of airport authorities). They are thus immune from a commerce clause challenge. *Reeves*, 447 U.S. at 439.

ARGUMENT

I. THE AHTA DOES NOT PROVIDE AN IMPLIED PRIVATE RIGHT OF ACTION TO CHALLENGE THE REASONABLENESS OF AIRPORT USER FEES AND RENTAL CHARGES

The gravamen of petitioners' claim is that subsection (b) of the Anti-Head Tax Act (AHTA), 49 U.S.C. App. § 1513(b), "prohibits all 'unreasonable' user fees on aircraft operators." Pet. Br. 21. Petitioners' claim is necessarily premised on the threshold proposition—which was accepted by the court of appeals—that the AHTA provides commercial airlines an implied private right of action to challenge in the federal courts the reasonableness of airport rental charges and user fees.[2] *See* J.A. 18-20. The Court should reject petitioners' attempt to deputize the

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[2] Petitioners assert that the issue of whether the AHTA provides a private right of action is not before the Court. *See* Pet. Br. at 19 n.18. Petitioners rest on the notion that respondents' failure to appeal that portion of the court of appeals' decision which held that the Airport was improperly allocating the costs of crash, fire and rescue services (CFR), now prevents them from raising the private right of action issue because it "was a necessary predicate to [the court of appeals'] holding on the CFR issue." *Id.*

A respondent, however, can "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), so long as doing so "will not expand the relief granted below." *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n.7 (1984). No cross-petition is required to do so. *Id.*; *see also Dayton Board of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977).

Because respondents raised the private right of action issue below, *see* J.A. 18-19, and do not seek to disturb the court of appeals' holding on the CFR issue, *see* Respondents' Reply in Support of Motion of United States for Leave to Participate in Oral Argument at 3, a ruling on the right of action issue will not result in the expansion of the relief granted by the court of appeals. Accordingly, respondents can raise in this Court the threshold question of whether petitioners have a private right of action under the AHTA.

federal courts, under the auspices of the AHTA, as the rent control boards for the nation's airports. This is for two reasons.

First, the AHTA's text, structure, and legislative history clearly demonstrate that, in enacting § 1513, Congress did not intend to provide a private right of action to challenge the reasonableness of airport user fees. Second, even if the Court disagrees with *amici*'s analysis of the AHTA's purpose, the most that petitioners can argue is that the AHTA is ambiguous on this issue. To imply a private right of action against the state and local governmental entities which operate airports in the face of this ambiguity—as both the court of appeals did below, *see* J.A. 18-19, and the Seventh Circuit did in *Indianapolis Airport v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984)—ignores the principles of federalism which must guide the federal courts in their construction of even those congressional enactments which concern interstate commerce. *See, e.g., Gregory v. Ashcroft*, 111 S.Ct. 2395, 2401 (1991).

A. The Text, Structure And Legislative History Demonstrate That The AHTA Does Not Provide A Private Right Of Action To Challenge The Reasonableness Of Airport User Fees And Rental Charges

1. Statutory construction begins with the "strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). However, "[i]n determining the meaning of [a] statute, [the court must] look not only to the particular statutory language, but [also] to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

Enacted by Congress in response to this Court's decision in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), which upheld against a commerce clause challenge an airport charge on each enplaning passenger, the AHTA provides in relevant part:

> (a) Prohibition; exemption
>
> No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . . .
>
> (b) Permissible State taxes and fees
>
> [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C. App. § 1513. As the language and structure of the AHTA demonstrate, subsection (a) is a limited preemption provision, setting forth those taxes and fees which are prohibited because they are either direct or indirect head taxes. Contrary to petitioners' contention, subsection (b) does not, on its own, set forth any other prohibited taxes or fees, but rather merely makes clear that the States, their subdivisions, and the nation's airports, could continue to charge those taxes and fees which are not head taxes or their equivalents. As the Court stated in *Aloha Airlines, Inc. v. Director of Taxation of Haw.*, 464 U.S. 7, 12 n.6 (1983), "[s]ection 1513(a) pre-empts a limited number of state taxes . . . . § 1513(b) clarifies Congress' view that the States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a).'"

Ignoring the AHTA's text and structure, petitioners assert that it "prohibits all 'unreasonable' user fees on aircraft operators," Pet. Br. 21, and that "the *Evansville* standard should serve as the baseline against which to

measure the 'reasonableness' of fees under § 1513(b)." *Id.* at 22. As an initial matter, *amici* note that petitioners' construction is flatly contradicted by the text of subsection (a), which does not contain " 'unreasonable' user fees" in its enumeration of prohibited taxes and fees. If, as petitioners assert, Congress had intended for the AHTA's prohibition of head taxes to extend to "all 'unreasonable' user fees on aircraft operators," Pet. Br. 21, then it could have easily inserted such language into subsection (a)'s enumeration of prohibited taxes and fees.

Nor does the text of subsection (b) provide any support to petitioners. In its ordinary meaning, the text of subsection (b)—"nothing shall prohibit a State . . . owning or operating an airport authority from levying or collecting reasonable rental charges"—embodies an affirmation of state authority and not a further restriction of it. To read subsection (b)'s affirmation of state authority as "prohibit[ing] all 'unreasonable' user fees on aircraft operators," Pet. Br. 21, simply defies the ordinary meaning of the statutory language.

It is also illogical, as a structural matter, to read § 1513(b) as authorizing judicial challenges to airport user fees and rental charges. As its heading states, § 1513(b) sets forth "[p]ermissible [s]tate taxes and fees," 49 U.S.C. App. § 1513(b); it does not, unlike § 1513(a), set forth a "[p]rohibition" of state taxes or fees. Accordingly, if, in enacting the AHTA, Congress had intended to prohibit unreasonable user fees and rental charges, the natural place to have done so would have been in subsection (a) and not subsection (b). Congress's failure to include " 'unreasonable' user fees," or other charges not calculated directly or indirectly on a per passenger basis, within the prohibition of subsection (a) thus demonstrates that its purpose in enacting the AHTA was confined to prohibiting direct or indirect head taxes.

Petitioners' reliance on the insertion of the word "reasonable" into subsection (b)'s clause pertaining to "rental

charges, landing fees, and other service charges" to imply a private right of action ignores the comprehensive background of aviation law against which the AHTA was enacted. An analysis of the federal aviation laws demonstrates that Congress's purpose in inserting the word "reasonable" into subsection (b)'s clause pertaining to rental charges and landing fees was to reconcile the AHTA with Section 18 of the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 18, 84 Stat. 219, 229 (1970) (codified as amended at 49 U.S.C. App. § 2210). Indeed, to view the congressional purpose in enacting the AHTA as authorizing federal court intervention in this area runs counter to the spirit of cooperative federalism which has long animated efforts to improve the nation's airports.

Beginning with the Federal Airport Act, ch. 251, Pub. L. No. 79-377, 60 Stat. 170 (1946), the development of the nation's airports has been marked by a partnership between the federal government, the States, and their subdivisions. Accordingly, in formulating the National Airport Plan, Congress directed the Administrator to "consult, and give consideration to the views and recommendations of . . . the States . . . and their political subdivisions." *Id.* § 3, 60 Stat. at 171. Congress further authorized the Administrator "to make grants of funds to sponsors [i.e., the States and their subdivisions] for airport development." *Id.* § 4, 60 Stat. at 172. In § 11 of the Act, Congress provided, however, that "[a]s a condition precedent to [the] approval of a project under this Act, the Administrator shall receive assurances in writing, satisfactory to him, that . . . the airport to which the project relates will be available for public use on *fair and reasonable terms* and without unjust discrimination." *Id.* § 11, 60 Stat. at 176 (emphasis added).

In 1970, when Congress determined that existing efforts to develop the nation's airports were inadequate, it enacted the Airport and Airway Development Act of 1970 (AADA), Pub. L. No. 91-258, 84 Stat. 219 (1970).

The AADA re-enacted the project sponsorship condition of § 11(1) of the 1946 Act with only minor modification. *See id.* 18(1), 84 Stat. at 229 (now codified as amended at 49 U.S.C. App. § 2210(a)(1)).

Viewed against this background, it is clear that Congress did not insert the term "reasonable" into the AHTA in order to provide a cause of action to challenge unreasonable user fees. Rather, the term was inserted to reconcile the AHTA with the language of the project sponsorship conditions of section 18(1) of the AADA. *Cf.* 15 Op. Off. Legal Counsel 31, 42 n.16 (1991) (noting comparability of language in § 1513(b) and 49 U.S.C. App. § 2210(a)(1)). Without the insertion of the term "reasonable," § 1513(b)'s clause covering user fees could well have been read as superseding the project sponsorship condition that an airport "be available for public use on fair and reasonable terms." AADA § 18(1), 84 Stat. at 229.[3] To attribute to Congress, as petitioners do, the

[3] While the AHTA does not expressly provide for judicial or administrative enforcement of its provisions, provisions of the Federal Aviation Act in force at the time of its enactment established an administrative enforcement scheme. Under current law, the Secretary is specifically granted the power to enforce the AHTA by 49 U.S.C. App. § 1354(a). Moreover, "any person may file with the Secretary . . . a complaint in writing with respect to" a violation of the AHTA. 49 U.S.C. App. § 1482(a). The Secretary may also "at any time . . . institute an investigation, on [his] own initiative . . . relating to the enforcement" of the AHTA. 49 U.S.C. App. § 1482(b). The Secretary's orders are subject to judicial review in the courts of appeals. 49 U.S.C. App. § 1486. Finally, in the event of a violation of the AHTA, the Secretary is authorized to seek injunctive relief in the district court. 49 U.S.C. App. § 1487(a); *see generally* 14 C.F.R. pt. 13.

Of note, in § 1487 Congress specifically authorized "any party in interest" to seek injunctive relief for violations of 49 U.S.C. App. § 1371(a), which requires that air carriers obtain a certificate of public convenience and necessity. That Congress authorized parties other than the Secretary to bring suit for injunctive relief in this limited circumstance provides additional evidence that Congress, in enacting the AHTA, did not intend to provide a private right of action. *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560,

purpose of authorizing a judicial challenge to airport user fees based on the single word—"reasonable"—requires too strained and hypertechnical a reading of the statute. *See, e.g., Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25-26 (1988).[4]

2. The legislative history of the AHTA provides further support for this view. As the Senate Report indicates, the AHTA was enacted to overrule this Court's decision in *Evansville*, which upheld an airport charge on each enplaning passenger against a commerce clause challenge. *See* S. Rep. No. 12, 93d Cong., 1st Sess. 17 (1973), *reprinted in* 1973 U.S.C.C.A.N 1434, 1446. In the Commerce Committee's view, head taxes were "particularly annoying," *id.* at 17, 1973 U.S.C.C.A.N. at 1450, as they caused "confusion, delay, anger and resentment" as ticket agents attempted to collect the tax from passengers. *Id.* at 21, 1973 U.S.C.C.A.N. at 1446. Moreover, because in enacting the AADA of 1970 Congress had imposed an eight percent tax on the price of all domestic tickets, the Committee viewed state and local head taxes as "constitut[ing] an inequitable, double burden of taxation on passengers." 1973 U.S.C.C.A.N. at 1450. The Senate Report further noted that in many instances, the revenues generated through state and local head taxes were not being earmarked for airport development, but

572 (1979). Indeed, as the First Circuit recognized in the context of the AAIA, judicial intervention under the auspices of the AHTA would undermine the Secretary's authority and the uniformity of federal law by allowing for "potentially conflicting decisions between the judicial and administrative forums." *New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 169 (1st Cir. 1989).

[4] As Judge Learned Hand stated:

> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . .

NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941) (*quoted in Shell Oil*, 488 U.S. at 25 n.6).

rather were being used to support local governments. *See id.* at 17, 22, 1973 U.S.C.C.A.N. at 1446, 1451.

The Senate Report, however, expressed no reservation about the rental charges and user fees being assessed by the nation's airports. *See generally id.* at 17-26, 1973 U.S.C.C.A.N. at 1446-55.[5] Indeed, the congressional concerns prompted by the imposition of head taxes are inapplicable to airport user fees and rental charges. Such fees are not collected from passengers and thus do not delay the arrival and departure of flights nor engender "anger and resentment" on the part of passengers. *Id.* at 17, 1973 U.S.C.C.A.N. at 1446. Nor do user fees and rental charges constitute a "double burden of taxation." *Id.* at 21, 1973 U.S.C.C.A.N. at 1450. Rather, such fees are collected only for services provided by the airport. And finally, because federal law generally prohibits the nation's airports from remitting surplus funds to the States and their subdivisions, *see* 49 U.S.C. App. § 2210(a)(12), airport user fees cannot be used as a general revenue source for the States and local governments. Accordingly, none of the concerns which led to Congress's prohibition of head taxes could conceivably have led it to regulate airport user fees and rental charges as well. The Senate Report thus demonstrates that Congress's purpose in enacting the AHTA was to prohibit direct and indirect head taxes and not "unreasonable" user fees and rental charges.

The Conference Report confirms this view. As the Conference Report stated, the Senate bill (which was enacted with amendments not relevant here) "provided for a permanent prohibition against the levy or collection of a tax or other charge on persons traveling in air commerce, or on the carriage of persons so traveling, or on the sale of

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[5] *See also Wardair Canada Inc. v. Florida Dept. of Rev.*, 477 U.S. 1, 16 (1986) (Burger, C.J., concurring) (noting complaints of States that earliest version of Senate bill would prohibit even "unobjectionable" charges such as landing fees, and the assurances of members of Congress in response that the bill would be clarified to reflect that the prohibition was to apply "only to 'head taxes' and the like").

air transportation or on the gross receipts derived therefrom." H.R. Conf. Rep. No. 225, 93d Cong., 1st Sess. at 5, *reprinted in* 1973 U.S.C.C.A.N. at 1458. This report also noted that "the prohibition would not extend to . . . the levy or collection of other charges . . . ." *Id.* at 6, 1973 U.S.C.C.A.N. at 1458. Like the Senate Report, the Conference Report manifests the limited purpose of the AHTA—to prohibit direct and indirect taxes apportioned on a per passenger basis. Neither report provides any support for petitioners' broad assertion that "[t]he AHTA outlawed all direct or indirect state and local fees on air travel except certain fees specifically exempted. . . ." Pet. Br. 13.

3. Relying on the legislative history, petitioners contend that in enacting the AHTA, "Congress intended for [user] fees to be measured by and to pass the *Evansville* standard." *Id.* at 21. Petitioners' position is logically flawed and contradicted by the legislative history.

As the Senate Report noted, Congress criticized the *Evansville* decision for "not provid[ing] adequate safeguards to prevent undue or discriminatory taxation." S. Rep. at 17, 1973 U.S.C.C.A.N. at 1446. After discussing the head taxes upheld in *Evansville*, the report continued:

> The Court, in essence, ruled that states and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers in order to underwrite airport operational and development costs. Yet, the decision did not sufficiently define the ruling as, for example, what constitutes a reasonable charge, or just how far a state or municipality could go in levying head taxes. Obviously, the decision raised more questions than it answered, and the result was predictable.

Id.

Not only does this passage's specific references to "charge[s] on . . . air passengers" and to "head taxes" provide further support for the view that the AHTA pro-

hibits only head taxes and not " 'unreasonable' user fees," Pet. Br. 21, the nature of Congress's criticism firmly repudiates petitioners' view. Having criticized the *Evansville* standard—a standard which, in large part, rests on balancing the amount of the fee imposed against the benefit provided or the cost incurred by the taxing authority, *see* 405 U.S. at 717-720—because it did not adequately define "what constitutes a reasonable charge," S. Rep. at 17, 1973 U.S.C.C.A.N. at 1446, Congress hardly could have intended to subject user fees and rental charges to the same ad hoc balancing. Rather, Congress's criticism of *Evansville* strongly suggests that, in enacting the AHTA, Congress intended to adopt a categorica! rule prohibiting head taxes. Adopting a categorical prohibition is entirely consistent with Congress's concern that *Evansville* did "not provide adequate safeguards to prevent undue or discriminatory taxation." *Id.* By flatly prohibiting the imposition of certain taxes—as it did in § 1513(a)—Congress addressed its concern with the adequacy of the *Evansville* standard and the competence of the judiciary to fashion a proper standard. It stretches credulity to suggest, as petitioners do, that Congress nonetheless intended for the very standard it found inadequate to be used for challenging airport rental charges and user fees.

B. The Court of Appeals' Implication Of A Private Right Of Action Ignores The Federalism Principles Which Inform The Construction Of Ambiguous Statutes Affecting State Interests

Amici submit that the AHTA's text, structure, and legislative history clearly demonstrate that it does not provide a private right of action to challenge the reasonableness of airport user fees and rental charges. To the extent the Court may disagree, *amici* submit that the most petitioners can argue is that the AHTA is ambiguous or silent on this issue. This ambiguity precludes the implication of a private right of action against a State or its subdivisions under the doctrine articulated in *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991), and many other cases.

The court of appeals, however, relied on this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), to conclude that under the AHTA, the airlines have an implied private right of action to challenge airport user fees and rental charges. *See* J.A. 18-20. In so concluding, the court of appeals reasoned that "the intent of Congress to grant a private right of action seems inherent in the language of the statute . . . . The AHTA expressly prohibits states from levying 'a tax, fee, head charge, or other charge directly or indirectly . . . .'" *Id.* at 19 (quoting 49 U.S.C. § 1513(a)) (ellipsis in original). Whatever the validity of the court of appeals' reasoning with respect to head taxes and their equivalents—an issue which is not present in this case—*amici* submit that the court of appeals' implication of a private right of action to challenge airport user fees and rental charges reflects a fundamental misunderstanding of the principles of federalism which this Court has articulated to guide the lower federal courts in their construction of ambiguous statutes affecting state interests.

As an initial matter, this case, unlike *Cort*, involves the application of a federal statute to a suit involving a political subdivision of a State [6] and not to a suit between private parties. *See* 422 U.S at 70-71. The Court has, of course, recognized that the States and their subdivisions "retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 111 S.Ct. at 2401; *see also New York v. United States*, 112 S.Ct. 2408 (1992) (recognizing a core component of state sovereignty beyond the scope of congressional power). In a variety of contexts implicating the interests of the States, the Court has thus declined to attribute "state-displacing weight [to] federal law" in the face of "mere congressional *ambiguity*." Laurence Tribe, *American Constitutional Law* § 6-25 at 480 (2d ed. 1988), *quoted in Gregory*, 111 S.Ct. at 2403.

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[6] In some States, airports are operated by arms of the State. *See, e.g.*, R.I. Gen. Laws §§ 1-2-1 et seq.

Accordingly, it is "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). As the Court explained in *Will*, this rule applies regardless of the power under which Congress has acted.

> *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Will, 491 U.S. at 65. And as the Court noted in *Gregory*, the plain statement rule is especially important in light of the Court's holding in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), that "left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers." 111 S.Ct. at 2403.

Disregarding these principles of statutory construction, the court of appeals erred in holding that, under the AHTA, the airlines have an implied private right of action to challenge airport user fees and rental charges. To interject the federal courts in disputes over the reasonableness of the user fees and rental charges assessed by the scores of airports operated by the States and their subdivisions—particularly in the absence of meaningful standards to guide their decisions—would clearly "'alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory*, 111 S.Ct. at 2401 (quoting *Will*, 491 U.S. at 65 (quoting *Atascadero*, 473 U.S. at 242)).[7] And to imply a private right of action to challenge airport user fees and rental charges under the AHTA is fundamentally erroneous in light of Congress's failure to provide a plain statement to that effect.

The AHTA does not, by its express terms, provide for judicial enforcement of its provisions. *See generally* 49 U.S.C. App. § 1513. And even if § 1513(a)'s language stating that "[n]o State . . . shall levy or collect" the enumerated prohibited taxes is a sufficiently clear statement of Congress's intent to subject the States and their local government subdivisions to suit (as opposed to the Secretary's administrative enforcement regime), petitioners cannot avail themselves of this provision. As discussed above, § 1513(a) does not include unreasonable

[7] To be sure, the AAIA reflects a substantial federal involvement in the area of airport finances. *Amici* submit, however, that with respect to the precise issue of airport user fees and rental charges, the federal interest arises only because the States and their subdivisions have, as a condition of receiving federal funds, "voluntarily and knowingly accept[ed] the terms of [a] contract," *Pennhurst*, 451 U.S. at 17 (internal quotation omitted), which requires them to make the airport "available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. App. § 2210 (a)(1). As part of the terms of this contract, the States and their subdivisions have also agreed to the Secretary's oversight of their user fees and rental charges. The AAIA scheme makes clear, however, that if a State (or its subdivision) declines to accept federal funding, its user fees and rental charges are not subject to federal oversight by either the Secretary or the courts.

Whether or not an airport authority has accepted federal funding under the AAIA, to construe the AHTA as providing a private right of action to directly challenge airport user fees and rental charges would "'alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory*, 111 S.Ct. at 2401 (quoting *Will*, 491 U.S. at 65 (quoting *Atascadero*, 473 U.S. at 242)).

rental charges and user fees in its enumeration of prohibited taxes. *See* 49 U.S.C. App. § 1513(a). Petitioners' right of action must therefore stem from § 1513(b).

Section 1513(b)'s language is not, however, a clear statement of Congress's intent to subject the States and their subdivisions to suits challenging airport user fees. Section 1513(b)'s language that "*nothing in this section shall prohibit a State* . . . owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges," 49 U.S.C. App. § 1513(b) (emphasis added), does not, by its express terms, prohibit unreasonable user fees. Rather, § 1513 (b) merely reaffirms the power of the States and their subdivisions to continue to levy those charges and fees which do not constitute head taxes. *Cf. Aloha Airlines*, 464 U.S. at 12 n.6. ("§ 1513(b) clarifies Congress' view that the States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a).'"). To the extent that § 1513(b)'s affirmation of airport authorities' power to collect "reasonable rental charges" can be said to imply a correlative limitation on their power to charge "unreasonable" fees—a notion which, as discussed above, is firmly contradicted by the text of § 1513(a)—it nonetheless falls far short of the "'unmistakably clear'" statement required to "'alter the 'usual constitutional balance between the States and the Federal Government.'" *Gregory*, 111 S.Ct. at 2401 (quoting *Will*, 491 U.S. at 65 (quoting *Atascadero*, 473 U.S. at 242)).[8] Because the court of appeals ignored this

[8] *Amici* also note that to the extent the AHTA is ambiguous on this issue, petitioners' contention that it prohibits "all 'unreasonable' user fees," Pet. Br. 21, and the court of appeals' holding that "[t]he AHTA prohibits the imposition of any fee on 'persons traveling in air commerce or on the carriage of persons traveling in air commerce' which are (sic) unreasonable," J.A. at 22 (quoting 48 U.S.C. App. § 1513(a)), conflict with the Secretary's reasoned construction of the AHTA. In *Investigation Into Massport's Landing Fees*, FAA Docket 13-88-2 (Dec. 22, 1988), *aff'd New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157

Court's requirement that Congress provide a plain and unambiguous statement of its intent to subject the States and their subdivisions to suits challenging airport user fees, it erred in holding that the AHTA provides a private right of action to challenge airport user fees and rental charges.[9]

(1st Cir. 1989), the Secretary rejected such a broad reading of the AHTA.

In *Massport*, the Secretary ruled that the airport's landing fee structure, which was assessed by adding a flat fee per landing regardless of aircraft size and a fee based on aircraft weight, thereby increasing the landing fees for small aircraft while decreasing the fees for large aircraft, *id.* at 3, violated the grant assurance that the "airport . . . be available for public use on fair and reasonable terms and without unjust discrimination." *See* 49 U.S.C. App. § 2210(a); *Massport Opinion and Order* at 9. The Secretary, however, also ruled that because the "fee formula does not appear to be in form or substance a head tax or its equivalent, Massport's fees do not violate the Anti-Head Tax Act." *Massport Opinion and Order* at 11. The Secretary's interpretation of the AHTA—that even unreasonable landing fees do not violate the AHTA unless they are "in form or substance a head tax or its equivalent," *id.*, is a reasonable interpretation of the statute to which the court of appeals was required to defer. *See, e.g., Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

[9] Because respondents are not arms of the State of Michigan, this suit does not implicate the Eleventh Amendment. *See Lincoln County v. Luning*, 133 U.S. 529 (1890). Nonetheless, if the AHTA provides a private right of action to challenge airport user fees, claims (such as petitioners') seeking the cross-crediting of airport concession revenues to reduce landing fees and terminal rent would clearly implicate the Eleventh Amendment where the airport authority is an arm of a State. The AHTA does not, however, provide a clear statement of congressional intent to abrogate a State's Eleventh Amendment immunity with respect to rental charges and landing fees. *See Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (quoting *Atascadero*, 473 U.S. at 242). It would be illogical to hold that the AHTA's language was nonetheless sufficiently clear so as to imply a private right of action against the political subdivisions of the State.